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No. 87-444

In the

Supreme Court of the United States

October Term, 1987

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Martin J. Costello
PETERSON, BELL, CONVERSE & JENSEN
2100 American National Bank Building
101 East Fifth Street
Saint Paul, Minnesota 55101
(612) 224-4703

Counsel for Respondent Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local N. 544

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Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 819 F.2d 191 (8th Cir. 1987).

STATEMENT OF THE CASE

This Respondent substantially agrees with Petitioners' Statement of the Case (Pet. 3–8) except for the inaccurate summary of the Eighth Circuit's decision that Petitioners ask this Court to review. The majority panel opinion did not, as petitioners state (Pet. 8), "conclud[e] that 'substantial continuity requires that predecessor's employees constitute a majority of the successor's workforce.'" The majority simply affirmed the district court's conclusion that Gateway was not a successor employer, based on the majority's concurrence in the district court's evaluation of appropriate and adequate factors, other than the continuity of the work force. These factors, the court held, "demonstrated that there is no substantial continuity between the Gateway and National operations." (Pet. A-7)

Moreover, Petitioners contend in their Statement of the Case (Pet. 8) that the concurring opinion, in finding that there was no Union breach of its duty of fair representation, "inexplicably" ignored an earlier decision in the same matter, *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354 (8th Cir. 1985) *("Smegal I")*, where the Eighth Circuit remanded to the district court for a determination on the successorship issue. This is an inaccurate characterization of the concurring opinion. The *Smegal I* court in remanding, merely said that "it cannot be said as a matter of law" that Gateway was not a successor employer at the summary judgment stage of the proceedings. *Id.* at 360. On remand the successorship issue was fully considered on the merits pursuant to stipulated facts, briefs and oral argument.

Finally, Petitioners' statement that the Union "did nothing" about Petitioners' grievance after it was rejected by Gateway (Pet. 6), must be corrected. The Union duly considered the merits of the grievants' successorship claim and decided that it should not be further pursued to arbitration.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the Petition.

The sole Question Presented in the Petition (p. i) is whether it is proper in a § 301 successorship case to apply "a fixed rule that there can be no successorship unless the predecessor's employees constitute a majority of the successor's work force." But the Eighth Circuit did not decide that question in this proceeding. The court did not rule that work force continuity turned on whether a majority of the successor's employees were those of the predecessor. Instead, the court did not adopt any rule on how to determine work force continuity, holding that the specific facts of this case compelled it to sustain the trial court's correct analysis and application of other appropriate successorship factors.

In its opinion (Pet. A-1 to A-9), the majority of the Eighth Circuit panel correctly noted that the basic consideration in determining successorship status is whether there is "substantial continuity between the new operation and the old, particularly with regard to the employees." (Pet. A-5) *See John Wiley & Sons, Inc., v. Livingston,* 376 U.S. 543, 551 (1964). Whether there is "substantial continuity" of business operations between enterprises depends upon a number of factors, including:

> . . . whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. ____, 107 S.Ct. 2225, 2236 (1987). Another important factor in determining successorship is "whether there exists substantial continuity of identity in the work force across the change in ownership." *Service, Hospital, Nursing Home and Public*

Employees' Union Local 47 v. Cleveland Tower Hotel, Inc., 606 F.2d 684, 687 (6th Cir. 1979). The successorship inquiry is, in all cases, "primarily factual in nature and is based on the totality of the circumstances in a given situation." *Fall River, supra,* 107 S.Ct. at 2236.

The continuity of the work force question, only one of many successorship considerations, depends upon the definition of "majority" employed by the decision maker. In its decision, the Eighth Circuit simply discussed the present status of "majority" determination law. The Eighth Circuit did not, however, adopt a specific formulation for determining work force continuity when it affirmed the district court's conclusion that Gateway is not a successor to National.

The court states that it previously has "not ruled directly on which test is to be used when a § 301 charge is involved" (Pet. A-6); and does not decide that question in this case either. The court merely points out that there is no Eighth Circuit precedent supporting the definition of "majority of employees" proposed by the Petitioners, *id.*, and then makes it clear that regardless of how the district court analyzed the continuity of the work force factor, its opinion must be affirmed: "Even if the appellants' definition of the majority test were accepted by the panel, the remaining factors used to evaluate substantial continuity support the district court's decision." (Pet. A-7) The court then reviews these other factors in light of the evidence and finds that "[o]n the whole, the weight of these factors suggests that Gateway is not a successor employer." *Id.* The court's analysis and conclusion were proper in all respects.

Whether an employer is a "successor" depends upon the legal and factual contexts in which the issue arises. "There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words may be a successor for some purposes and not for others." *Howard Johnson Co. v. Detroit Local Executive Board, Hotel & Restaurant Employees and Bartenders International Union, supra,* 417 U.S. 249, 262, n. 9 (1974). Therefore, "in light of the diffi-

culty of the successorship question, the myriad factual circumstances and legal context in which it can arise and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Id.* at 256.

The circuit court examined the district court's findings of fact under the appropriate "clearly erroneous" standard of review. *Jorgensen v. Modern Woodmen of America,* 761 F.2d 502 (8th Cir. 1985); Fed. R. Civ. P. 52(a). It noted that the matter must be considered, as the trial court did, in light of national labor policy and the rights and interests of the parties, as well as the facts. The court explicitly, and implicitly through approval of the district court's decision, performed the required analysis suggested by *Howard Johnson, supra,* 417 U.S. at 262, n. 9.

Because the decision of the Eighth Circuit turns solely upon its consideration of the particular and unique facts involved in this dispute rather than upon the Question Presented by the Petitioners, certiorari should not be granted. This Court does not grant certiorari to review evidence and discuss specific facts, *e.g., United States v. Johnston,* 268 U.S. 220, 227 (1925), especially where, as here, the court of appeals has affirmed the factual findings of the district court. *See Rogers v. Lodge,* 458 U.S. 613, 623 (1982).

The Eighth Circuit's decision simply does not provide an appropriate vehicle for deciding the Question Presented by Petitioners. Moreover, Petitioners acknowledge this in the footnote to their overly narrow and incorrectly stated Question Presented (Pet. i, bottom of page). Petitioners state, "If the instant petition is granted, petitioners intend to raise an additional question: Must the parties' stipulation of facts on the **other** factors customarily involved in successorship determinations be given effect?" That statement betrays Petitioners' own recognition that the Eighth Circuit's decision was based on adequate factual determinations and grounds independent of the Question Presented in the petition. The court of appeals did not hold any continuity of work force test applicable in § 301 actions, nor

was such a holding implicit in the result. Because the Eighth Circuit's decision clearly was premised on other relevant, appropriate and adequate factual determinations, this case simply does not raise the Question Presented by Petitioners.

2. The decision below involved a determination of successorship in a specific factual situation involving a breach of fair representation claim and therefore does not provide an appropriate context in which to decide the Question Presented.

Petitioners argue that certiorari should be granted because of conflicting decisions by this Court and other circuits on the appropriate test for analyzing work force continuity. Petitioners strenuously argue at the same time, however, that this Court has not yet clearly decided the meaning of work force continuity in § 301 actions, and that its guidance is needed on that question. Even if this proposition is accepted, this case is not an appropriate one for definitively deciding the issue.

As the concurring opinion suggests (Pet. A-8), in this case the ultimate issue is "whether the Union violated its duty of fair representation." *Id.* In this duty-of-fair-representation case, the issue of successorship is important primarily as it relates to the Union's decision not to pursue Petitioners' grievance based on the theory that Gateway was a successor to their former employer National. Successorship itself is therefore the *sine qua non* of Petitioners' action. The concurring opinion author recognizes this in stating that "[w]hatever the merits of the question of successorship. . . I am persuaded that it is, as a matter of law, close enough to justify the Union's decision not to pursue a grievance based on a successorship theory." (Pet. A-8 to A-9)

This analysis is not in conflict with *Smegal I,* as Petitioners suggest (Pet. 8). *Smegal* I held that the successorship issue could not be determined as a matter of law at the summary judgment stage. The concurring opinion's analysis in *Smegal II* occurred

after the merits of the successorship issue had been heard, tried and determined on the facts and law. Nothing in *Smegal I* prohibits the concurring opinion's conclusions after trial on the merits of the successorship issue that the Union did not violate its duty of fair representation.

CONCLUSION

For these reasons, the Petition for a Writ of certiorari should be denied.

Respectfully submitted,

Martin J. Costello
PETERSON, BELL, CONVERSE
& JENSEN
2100 American National Bank Building
101 East Fifth Street
Saint Paul, Minnesota 55101
(612) 224-4703

Counsel for Respondent Over-the-Road, City Transfer, Cold Storage, Grocery & Market Drivers, Helpers & Inside Employees Union, Local No. 544

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